

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 752 OF 2006

LAWRENCE JOSIAH OYUYO..... APPELLANT

VERSUS

MOHAMMED ASIFU RESPONDENT

(Appeal from the Ruling in CMCC NO. 4702 of 2001 before D.A Okundi (Mrs) Dated 30th June, 2006 Milimani Commercial Court)

JUDGMENT

The respondent filed a suit against the appellant for damages following a road traffic accident. Summons to enter appearance though issued were not served upon the appellant on at least three occasions. On all those occasions the respondent returned to court for extension of the said summons.

Aggrieved by the orders that were given to allow the said extension, he appellant herein applied by way of Notice of Motion dated 5th and filed on 6th July, 2006 to set aside the orders that had earlier extended the validity of the summons. Additionally, he applied that the plaint filed is struck out with costs.

The application was heard by the then Senior Resident Magistrate Mrs. D.A Okundi who dismissed the application and commented in her ruling that the court having extended the validity of summons any grievance ensuing from the said order ought to be addressed by way of an appeal.

The appellant therefore filed this appeal contending *inter alia* that, the learned trial magistrate erred in law and fact that the order which extended the validity of summons to enter appearance could only be challenged or addressed by way of appeal and not otherwise. She also failed to appreciate that the order that extended the validity of the said summons was a nullity in law for having been granted without jurisdiction and after the expiry of the summons.

That extension could only be challenged by an application to set aside the offending order and an appeal was not necessary. She was also faulted for not relying on the cited cases which were in favour of the appellant. The appeal was argued by way of written submissions by both parties which I have considered.

After the extension of the summons the appellant applied to file a defence which was allowed. The said defence was filed on 16th January, 2006. That was before the application leading to the ruling by Mrs. Okundi was filed. In that defence he reserved the right to raise the issue that the suit had abated for non service of the summons. The position I take is that, the appellant has submitted himself to the jurisdiction of the court by filing the defence and therefore any other matters shall be raised during the trial.

Further, I consider the issue of service of summons, or failure to do so within the prescribed time, to be a technicality which has been addressed by Article 159 (2) (d) of the Constitution.

Further, Section 1A of the Civil Procedure Act clearly provides that the overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. If I were to strike out the plaint as prayed by the appellant, I will be going against the said provisions, and as a result drive the appellant from the seat of judgment. A party should be allowed to have his day in court provided that no prejudice is occasioned to the other.

In the instant case, the appellant has not shown any prejudice and therefore the appeal is dismissed with costs to the respondent.

The original file shall be returned to the lower court and considering that this is an old case the hearing shall be conducted expeditiously before another magistrate of competent jurisdiction.

Orders accordingly.

Dated and delivered at Nairobi this 2nd Day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE